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No. 90-1464

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In The

Supreme Court of the United States

October Term, 1990

VOLKSWAGEN OF AMERICA, INC. AND VOLKSWAGENWERK AKTIENGESELLSCHAFT,

Petitioners,

vs.

DOUG ROY, JR., Individually; MARSHA ROY, Individually; SHANNON ROY, a minor, By and through Her Guardians Ad Litem, DOUG ROY, JR. and MARSHA ROY; and DOUG ROY, III, a Minor, By and through His Guardians Ad Litem, DOUG ROY, JR. and MARSHA ROY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Ninth Circuit correctly apply the settled standard of review (abuse of discretion) in reversing the order of the United States District Court for the Central District of California granting a new trial on the ground the jury's verdict was against the great weight of the evidence?

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RESPONDENTS' BRIEF IN OPPOSITION

* In their caption, petitioners mistakenly identified Marsha Roy as a minor and omitted Shannon Roy, a minor. Respondents are correctly identified in the caption to this brief in opposition.

INTRODUCTION

This is a products liability action based on defects in a passenger van designed and distributed by petitioners Volkswagenwerk Aktiengesellschaft and Volkswagen of America, Inc. (collectively "Volkswagen"). Doug Roy ("Mr. Roy"), his wife Marsha, and their children Shannon and Doug, III, were seriously injured when their Volkswagen van rolled over and caught fire. They brought a diversity action against Volkswagen based on theories of strict liability, negligence, and breach of warranty. The Roys alleged that the defective design of the Volkswagen van made it highly unstable and caused it to roll over.

At trial, the issues of design defect and causation were hotly contested. A unanimous jury found in favor of the Roys. The district court, however, granted Volkswagen's motion for a new trial, believing the verdict was contrary to the great weight of the evidence.

The second trial resulted in a verdict for Volkswagen. The Roys appealed, asserting that the jury's verdict in the first trial was wrongly set aside and that the second trial was infected by various errors. The Ninth Circuit reversed, holding the district court had abused its discretion in setting aside the first jury verdict. The court of appeals ordered reinstatement of the original jury verdict in favor of the Roys. Volkswagen sought rehearing and rehearing en banc. Both were denied. Not a single circuit court judge requested a vote to hear the matter en banc.

Now, Volkswagen seeks a writ of certiorari on the ground there is a conflict among the circuits concerning the standard of review for new trial orders. Volkswagen labors long and hard to create this supposed conflict. In

fact, none exists. All circuits agree that a district court's decision to order a new trial on the ground a verdict is contrary to the great weight of the evidence may be reversed for an abuse of discretion. This is precisely the standard the Ninth Circuit applied in this case.

What Volkswagen is really complaining about is not that the Ninth Circuit applied the wrong standard of review, but that it concluded the district court had abused its discretion in granting a new trial in this particular case.

Under these circumstances, review is unwarranted. The petition should be denied.

STATEMENT OF THE CASE

I. THE PERTINENT FACTS.

On the morning of August 14, 1982, the Roys set out in their VW van on a family trip from their home in California to Texas. "During the trip, the van experienced periodic mechanical problems related to the fuel line that caused the van to run roughly. Mr. Roy, who was experienced in repairing automobiles, replaced various parts hoping to remedy the problem. Though each repair initially seemed to make the van run well, the problem soon recurred." *Roy v. Volkswagen of Am., Inc.*, 896 F.2d 1174, 1175-76 (9th Cir. 1990).

At nightfall on August 16, 1982, somewhere past El Paso, the van again began to display symptoms of fuel deprivation and to lose speed. *Id.* at 1176. The Roys

pulled off the highway. It was drizzly and dark. Reporter's Transcript (hereinafter "R.T.") at 370. With no service station in the area, Mr. Roy was forced to improvise a repair to keep the van going. R.T. at 534. He plugged the opening of the fuel line and connected an alternative line from the fuel pump into the fuel tank. R.T. at 514-16. Mr. Roy considered the fuel bypass hose a temporary repair which he would replace the next day when he arrived at his destination. R.T. at 517-18.

After the repair, the van ran smoothly until the time of the accident. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176. Mr. Roy continued to drive for an hour and then turned the wheel over to Marsha while he slept in the back. R.T. at 370, 374, 483-84. The next morning, Mr. Roy awoke refreshed and started to drive. At approximately 8:00 a.m., Mr. Roy was driving east on Interstate 10 just outside of Sonora, Texas. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176. At that point, Interstate 10 is a flat, level road with two lanes going in each direction, a paved shoulder, an unpaved coliche surface outside the paved shoulder, and a grass and dirt median. *Id.* at 1176; R.T. at 57, 111. There is a two-to-three-inch drop-off leading to the unimproved surface. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176. Mr. Roy recalls driving in the slow lane at approximately 50-55 miles per hour. *Id.* Suddenly, for reasons hotly disputed by the parties, the van overturned, began to roll, and caught fire. *Id.*

"Mr. Roy and two eye witnesses, Wade Fitzgerald and Jerry Jardee, all testified that the van never left the pavement." *Id.* at 1178. The two eyewitnesses were driving onto Interstate 10 from the east, opposite the Roys, R.T. at 54-57, when they observed the accident. R.T. at

61-65, 133, 145, 149, 159, 161-62. Both witnesses testified they saw the van roll over and burst into flames while it was on the paved portion of the highway. R.T. at 61-65, 77, 128-29, 145, 149, 161; exhibits 3, 11. Jardee testified he saw a dog on the road as the accident was unfolding and presumed Mr. Roy swerved to avoid hitting it. R.T. at 147-48, 159, 165, 236. Volkswagen, which offered no eye-witness testimony, speculated that Mr. Roy fell asleep while driving and drifted onto the unimproved portion of the highway. When he awoke and realized where he was, Volkswagen contended, he turned abruptly in an attempt to return to the road, causing the van to "trip" when the wheels hit the two-to-three-inch elevated pavement.

Mrs. Roy was thrown from the van as it rolled. R.T. at 65, 74. She ran to the back of the van to remove Doug Roy, III, who was on fire. R.T. at 65, 75, 163. Fitzgerald and Jardee helped rescue Shannon and Mr. Roy from the burning van. R.T. at 75, 138-40. Mr. Roy passed out when the fire hit him. R.T. at 487. Each of the Roys suffered significant injuries and trauma as a result of the accident. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176. Doug Roy, III, who was burned most severely, will require lifelong medical attention, including extensive skin grafting. R.T. at 137, 163, 318-32, 471, 698-99, 709-25.

The expert evidence presented at trial concerning the defective design of the Volkswagen van was extensive and contradictory. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1177. Among other things, the Roys' experts testified that the swing-axle suspension system was unstable and defective, making the van susceptible to rolling over. *Id.*

II. PROCEDURAL HISTORY.

A. The District Court's New Trial Order.

In November 1984, a unanimous jury returned a special verdict finding that the van was defectively designed and the defect caused the Roys' injuries. The jury awarded $3,000,000 in compensatory damages to the Roys. The jury assessed 40% of the fault to the driver, Mr. Roy. However, the district court, Judge Jesse Curtis, granted Volkswagen's motion for a new trial under Federal Rule of Civil Procedure 59, on the ground the verdict was against the great weight of the evidence. *Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F. Supp. 653 (C.D. Cal. 1985).

First, the court believed the jury's finding that the Volkswagen van was defectively designed was contrary to the great weight of the evidence.[1] Second, it believed that the jury's determination that the roll over was caused by the van's defective design was against the great weight of the evidence. *Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F. Supp. at 654-55.[2] The district court explained that it was essential for the Roys to prove that the roll over commenced while the vehicle was on the paved portion of the road. *Id.* at 655. The district court

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[1] The Ninth Circuit rejected the district court's determination on this point. Volkswagen does not challenge the Ninth Circuit's ruling in this regard. Petn. at 6 n.4.

[2] Since the district court disagreed with the jury's defect and causation findings, the court concluded the jurors must have been "swayed by emotion and sympathy for the little boy." *Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F. Supp. at 655.

refused to credit the testimony of the two independent eyewitnesses and relied solely on the evidence presented by Volkswagen. Specifically, the district court found that the testimony of the eyewitnesses was not supported by police photographs taken following the accident, that "there was no physical evidence of any kind such as marks on the highway to support plaintiffs' theory," and that video tapes prepared by Volkswagen demonstrated that the eyewitnesses could not have determined from their vantage point whether the van commenced its roll on the pavement or off the road. *Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F. Supp. at 655.

The Roys attempted to appeal Judge Curtis' new trial order, but the Ninth Circuit held that the order, being interlocutory in nature, was not appealable. *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670 (9th Cir. 1985).

Pursuant to the new trial order, a second trial took place, resulting in a defense verdict.[3] After judgment was entered in favor of Volkswagen, the Roys appealed, arguing that Judge Curtis abused his discretion in granting Volkswagen's motion for a new trial and that the second trial was infected by various errors.

B. The Court Of Appeals' Decision.

The court of appeals set forth the standard it would apply to review the district court's new trial order as follows:

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[3] Judge Stephen V. Wilson presided over the second trial.

> "The trial court may grant a new trial, even though the verdict is supported by substantial evidence, if 'the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice.' " While the trial court may weigh the evidence and credibility of the witnesses, the court is not justified in granting a new trial "merely because it might have come to a different result from that reached by the jury." We review an order granting or denying a motion for new trial for an abuse of discretion. Thus, if the jury's verdict is not clearly against the weight of the evidence, the trial court abuses its discretion in ordering a new trial.

Roy v. Volkswagen of Am., Inc., 896 F.2d at 1176 (citations omitted).

Applying this standard, the circuit court unanimously agreed with the Roys that the district court had abused its discretion in granting Volkswagen's motion for a new trial.[4] The court of appeals first held that the jury's finding of a design defect was not contrary to the great weight of the evidence. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176-77. Volkswagen does not challenge this holding. Petn. at 6 n.4.

The court of appeals then turned to the causation issue, the alternative ground cited by the district court to justify its new trial order. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1177-78. The court focused on the evidence

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[4] In light of this ruling, the court found it unnecessary to address any of the claims concerning the second trial. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1179.

offered by Volkswagen, upon which the district court had so heavily relied. A surveyor retained by Volkswagen testified that from their vantage point, the two eyewitnesses could not have observed the surface of the highway, the lane markings on the highway, or the adjoining gravel shoulder. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1178. However, as the court of appeals noted: "The Roys did not dispute that the highway markings were not visible from the vantage point of the eye witnesses, but contended nevertheless that Mr. Fitzgerald and Mr. Jardee could have determined in which lane the van was traveling." *Id.*

The court also referred to the testimony of Volkswagen's accident reconstructionist who speculated that Mr. Roy had fallen asleep at the wheel, drifted off the road, and caused the van to roll over when he attempted to return to the highway. R.T. at 1468-69. The reconstructionist relied on notes and photographs taken by police at the scene following the accident. *Id.* The court noted the reconstructionist testified that he ignored evidence which did not support his (i.e., Volkswagen's) theory. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1178. The court also noted that the trial testimony of the Texas trooper who took the notes upon which the accident reconstructionist relied differed substantially from his deposition testimony, which had been consistent with the eyewitnesses' version of events. Furthermore, the trooper changed his position only after he had conferred with Volkswagen's reconstructionist. *Id.*

The Ninth Circuit concluded: "The evidence in this case was *substantially balanced*. VW's evidence did not so preponderate that it fell within the discretion of the trial

judge to rule that the jury's verdict was against the great weight of the evidence." *Id.* at 1179 (emphasis added).[5] The Ninth Circuit ordered reinstatement of the original jury verdict.

Volkswagen petitioned the Ninth Circuit for rehearing and suggested a rehearing en banc. After amending the opinion in minor respects, the three-judge panel

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[5] The Ninth Circuit also addressed the district court's conclusion that the jury must have been "swayed by emotion and sympathy." *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1178-79. The court of appeals realized this reference to emotion and sympathy was merely a conclusory statement, noting that the district court "pointed to no evidence . . . to support [its] ruling [that the jury was improperly swayed by emotion and sympathy]." *Id.* at 1178.

The issue is not whether there may have been jury sympathy, but whether the verdict was against the great weight of the evidence. As the court of appeals pointed out:

> Certainly a jury presented with a case like this one, involving horrible burn injuries to a child, will be likely to feel great sympathy. The question, however, is whether the jury was able to put aside its personal feelings during its deliberations and decide the case as the evidence and the law dictated. *There is no evidence that the jury here did otherwise.*

Id. at 1178-79 (emphasis added).

In fact, the jury's verdict demonstrates it did put aside any feelings of sympathy and considered the case on its merits. The damages awarded were consistent with the amount the experts estimated would be required to compensate the Roys for their injuries and treatment. Moreover, the jury declined to award punitive damages. *Id.* at 1179. Finally, the jury assessed 40% of the fault to Mr. Roy. These are hardly the findings of a jury overcome by sympathy.

unanimously denied the petition. *Roy v. Volkswagen of Am., Inc.*, 920 F.2d 618 (1990). The full court was advised of Volkswagen's en banc suggestion, but *not a single judge requested a vote to decide whether to rehear the matter en banc. Id.* at 619.

C. Volkswagen's Pending Appeal.

By order entered January 28, 1991, the district court filed and spread the mandate of the Ninth Circuit. On February 15, 1991, Volkswagen filed a notice of appeal with the Ninth Circuit seeking to overturn the original jury verdict. Respondents' Appendix at 1a. The appeal is pending.

D. Volkswagen's Petition For Certiorari.

On March 18, 1991, the same day it filed its Civil Appeals Docketing Statement with the Ninth Circuit in the pending appeal, Volkswagen filed its petition for certiorari with this Court.

LEGAL DISCUSSION

THE COURT OF APPEALS CORRECTLY APPLIED THE UNIVERSALLY RECOGNIZED ABUSE OF DISCRETION STANDARD IN REVERSING THE DISTRICT COURT'S NEW TRIAL ORDER.

Volkswagen argues that there is "a conflict among the circuits about the scope of the district courts' discretion to order a new trial, and the appellate courts' power of

review." Petn. at 12.[6] Volkswagen classifies the appellate courts into so-called "traditionalists" and "revisionists," concludes the latter are gaining the upper hand, and thereby attempts to create the impression that there is a crisis within the federal judiciary which requires "[t]his Court's guidance . . . to secure a uniform rule on an issue that touches every case tried in the United States district courts." Petn. at 11.[7]

The reality is quite different. Although at one time orders granting or denying a new trial on the ground a verdict was against the great weight of the evidence were considered nonreviewable, *see generally* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2819, at 120-21 (1973), today *all* courts agree such orders are reviewable for an abuse of discretion.[8] *See, e.g., McNeal v. Hi-Lo*

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[6] Volkswagen has framed its argument in the form of two distinct issues, focusing separately on the trial courts' discretion in ruling on new trial motions and on appellate review of such rulings. Because the two are inseparably linked, we address them together in this brief.

[7] Volkswagen claims that "the number of reversals of new trial orders appears to have increased dramatically, especially in cases where the trial court allowed a new trial on grounds that the verdict was against the weight of the evidence." Petn. at 11. *Volkswagen offers absolutely no evidence or authority to support this ipse dixit*

[8] The change has resulted from the elimination of two historical barriers to appellate review. *See generally* 6A J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice ¶ 59.08[6], at 59-165 to 59-167 (2d ed. 1989); Recent Decisions, *Appellate Review in the Federal Courts of Orders Granting New Trial*, 13 Stan. L. Rev. 383, 384 n.1 (1961). First, for many years, the motion for a new trial and the judge's ruling thereon were not made part of the record on appeal. By 1933, this practice

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Powered Scaffolding, Inc., 836 F.2d 637, 646 (D.C. Cir. 1988); *Coffran v. Hitchcock Clinic, Inc.*, 683 F.2d 5, 6 (1st Cir.), *cert. denied*, 459 U.S. 1087 (1982); *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 523, 541 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); *Consumers Power Co. v. Curtiss-Wright Corp.*, 780 F.2d 1093, 1097 (3d Cir. 1986); *Abasiekong v. City of Shelby*, 744 F.2d 1055, 1059 (4th Cir. 1984); *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1523 (6th Cir. 1990); *Spanish Action Comm. of Chicago v. City of Chicago*, 766 F.2d 315, 321 (7th Cir. 1985); *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 415 (8th

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had changed. *See Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482 (1933). Second, courts were constrained by section 22 of the Judiciary Act of 1789, 1 Stat. 84, which provided that there should be no reversal "for any error in fact." 6A J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice ¶ 59.08[6], at 59-166 (2d ed. 1989); Recent Decisions, *supra*, at 384 n.1. However, this prohibition was removed by the 1948 revision of the Judicial Code. *Id.*

Consequently, Volkswagen's reliance on dicta from several old cases suggesting new trial orders are not reviewable, Petn. at 13-15, 21, is totally misplaced. The historical justifications for those pronouncements are no longer valid. These historical circumstances may also explain some of the language from more recent decisions of the Second Circuit, which cite cases from the era when appellate review was precluded by the practical and statutory limitations mentioned above. Furthermore, as we shall show below, the Second and Fourth Circuits, which Volkswagen characterizes as the two circuits which "consistently adhere to the traditional approach," Petn. at 16 n.9, have not hesitated to reverse new trial orders when they determine that an abuse of discretion has occurred. *See infra* at pp. 20-21.

Cir. 1985); *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 868 (1990); *Patty Precision Prods, Co. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247, 1251 (10th Cir. 1988); *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir. 1982).[9]

Aside from Volkswagen's citations to outmoded case law suggesting trial court rulings on new trial orders are not reviewable, Petn. at 13-14, 21, even Volkswagen does not dispute the uniformly recognized abuse of discretion standard of review. Rather, Volkswagen attempts to demonstrate that while all courts recite abuse of discretion language, some courts "give [the abuse of discretion standard] a completely different meaning." Petn. at 15. As we now show, this is simply not true.

Volkswagen states "courts of appeals that adhere to the traditional view hold that trial courts can and should weigh evidence and credibility when determining whether to grant a new trial." Petn. at 16 (footnote omitted). So do the so-called "revisionists," including the Ninth Circuit in this very case.[10] *Roy v. Volkswagen of Am.*,

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[9] Some of the cases cited here and elsewhere in the brief deal with conditional new trials pursuant to Federal Rule of Civil Procedure 50(c). For purposes of appellate review, the courts make no distinction between such conditional new trials and new trials ordered pursuant to Federal Rule of Civil Procedure 59. *See also* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2540, at 617 (1971).

[10] The fallacy of Volkswagen's dichotomy is evidenced by Volkswagen's own inability to determine whether certain circuits follow the "traditional" or the "revisionist" approach. According to Volkswagen, the Fifth Circuit follows the traditional approach "occasionally," Petn. at 16 n.9, and the First,

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Inc., 896 F.2d at 1176 ("[T]he trial court may weigh the evidence and credibility of the witnesses."); *see also McGee v. South Pemiscot School Dist. R-V*, 712 F.2d 339, 344 (8th Cir. 1983) ("It is within the trial court's discretion to grant or deny a new trial based on its reading of the evidence."); *Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982) (" 'Although a trial judge cannot weigh the evidence when confronted with a motion [for judgment] notwithstanding the verdict, in a motion for a new trial the judge is free to weigh the evidence.' " (citation omitted)); *Duncan v. Duncan*, 377 F.2d 49, 52 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967) ("In ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, a district judge must compare the opposing proofs and weigh the evidence, and 'it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence.' " (citations omitted)).

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Seventh, Ninth and Tenth Circuits "adhere to [the traditional approach] often but not always." *Id.* (Interestingly, one case – *Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986 (1st Cir. 1978) – appears as an example of a traditional, Petn. at 15, as well as a revisionist decision, Petn. at 18. Volkswagen appears to classify decisions from these circuits as "traditional" when they affirm a new trial order and as "revisionist" when they reverse. This result-oriented analysis confirms the fact that the gist of Volkswagen's argument centers on its disagreement with the Ninth Circuit's decision in this particular case and not on any real dispute over the standard of review.

Similarly, Volkswagen claims "a district court may, under the traditional rule, set aside a jury's verdict that is against the great weight of the evidence, even if the verdict is supported by 'substantial evidence.' " Petn. at 16. Once again, the so-called "revisionists" – including the Ninth Circuit in this case – agree. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176 (" 'The trial court may grant a new trial, even though the verdict is supported by substantial evidence.' "); *see also Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982) (in ruling on a motion for new trial on the ground the verdict is against the great weight of the evidence, the trial court is not required to consider only evidence supporting the jury's verdict); *O'Neil v. W.R. Grace & Co.*, 410 F.2d 908, 913 (5th Cir. 1969) ("We recognize the proposition that a district judge may- . . . grant a new trial for reasons which would not support a judgment notwithstanding a verdict.").

According to Volkswagen, a district court determination that a verdict is against the great weight of the evidence should be conclusive. Petn. at 27 ("Under the traditional rule, [the district court's ruling in this case that the verdict was against the great weight of the evidence] was unassailable."). Whatever may have been the rule in ages past, current law belies Volkswagen's position. While "[t]he authority to grant a new trial . . . is confided *almost* entirely to the exercise of discretion on the part of the trial court," *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (emphasis added), its discretion is not unlimited. As the Ninth Circuit correctly stated in its opinion, "[w]hile the trial court may weigh the evidence and credibility of the witnesses, the court is not justified in granting a new trial 'merely because it might

have come to a different result from that reached by the jury.' " *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176 (quoting *Wilhelm v. Associated Container Transp. (Australia) Ltd.*, 648 F.2d 1197, 1198 (9th Cir. 1981)). The trial judge does not sit as a thirteenth juror:

> [W]hile [the district court judge] has a responsibility for the result no less than the jury, he should not set the verdict aside as against the weight of the evidence merely because, if he had acted as trier of fact, he would have reached a different result; and in that sense he does not act as a thirteenth juror in approving or disapproving the verdict. Moreover, since the credibility of witnesses is peculiarly for the jury *it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict.*

6A J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice ¶ 59.08[5], at 59-147 to 59-149 (2d ed. 1989) (footnotes omitted) (emphasis added); *see also Payton v. Abbott Labs*, 780 F.2d 147, 153 (1st Cir. 1985) ("The trial judge should not act as a '13th juror' and set aside a verdict simply because he would have reached a different result had he been the trier of fact.").

When the district court *denies* a new trial motion, thereby respecting the jury's verdict, its decision is entitled to greater deference. However, the situation is different when the trial court *grants* a motion for a new trial, thereby nullifying the jury's efforts.[11] As Wright and Miller explain:

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[11] Volkswagen alleges the "revisionist" courts apply " 'gradations of scrutiny' to new trial orders, depending on

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> There is no Seventh Amendment problem, however, if the appellate court reverses the trial court's grant of a new trial. In this instance the appellate court is not reexamining facts found by a jury [as is the case when the appellate court reverses an order denying a new trial motion] but is reinstating the jury's findings as against the contrary findings of the judge. Appellate action in this context protects the role of the jury, as envisioned by the Seventh Amendment, rather than running contrary to it.

11 C. Wright & A. Miller, Federal Practice and Procedure § 2819, at 126 (1973); *see also Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1048 (2d Cir.), *cert. denied*, 469 U.S.

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whether the new trial was granted or denied, and if granted, on the grounds for it." Petn. at 22. If this means that courts consider such factors in determining whether an abuse of discretion has occurred, Volkswagen is correct. If, however, Volkswagen is claiming different courts apply differing standards of review, it is off base. The fact that a court may examine the record with differing degrees of scrutiny under differing circumstances does not mean it is applying different standards of review. *See Williams v. City of Valdosta*, 689 F.2d 964, 974 n.8 (11th Cir. 1982).

Volkswagen also makes repeated references to the fact the jury was exposed to the "horribly disfigured" child, Petn. at 6-8, and suggests this constituted "prejudicial conduct or pernicious behavior," which appellate courts have traditionally recognized as calling for greater deference to the trial court. Petn. at 28; *see also id.* at 25, 29. First, the district court referred only to sympathy and never used the terms "prejudice" or "pernicious behavior." Second, it was *Volkswagen* which asked, during voir dire, that the jury be permitted to see Doug Roy, III, in person and in photographs. Volkswagen even suggested the boy remove his shirt. 10/16/84 R.T. at 6-7. Volkswagen's request came "as a bit of surprise" to Judge Byrne, 10/16/84 R.T. at 7, who presided at voir dire.

854 (1984) (court agrees with "the need of particularly close appellate scrutiny where the trial judge grants a new trial solely because the judge regards the verdict as against the weight of the evidence"); *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969) ("But against [the trial court's] judgment we must consider that the agency to whom the Constitution allocates the fact-finding function in the first instance – the jury – has evaluated the facts differently." (footnote omitted)).

Thus, it has been said that "new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great – not merely the greater – weight of the evidence." *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 363 (5th Cir. 1980); *see also Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982). Accordingly, a verdict is not against the great weight of the evidence – and a new trial may not be granted – merely because the jury *could have* found for the losing party.

Volkswagen also suggests that many "revisionist" courts confuse the standard of review applicable to new trial orders with that applicable to judgments notwithstanding the verdict. Petn. at 18-19, 27 n.12. In fact, cases Volkswagen cites expressly recognize the distinction. *See Rosenfield v. Wellington Leisure Prods., Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987); *J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1373 n.12 (11th Cir. 1982); *Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 186-87 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973). It is also worth noting that even courts classified as "traditional" by Volkswagen cite JNOV cases. *See, e.g., Landes Constr.*

Co. v. Royal Bank of Canada, 833 F.2d 1365, 1372 (9th Cir. 1987) (citing *Tennant v. Peoria and Pekin Union Ry.*, 321 U.S. 29, 35 (1944)). To suggest that "revisionist" courts are not aware of the difference between the standard of review for judgments notwithstanding the verdict and for new trial orders is ludicrous. While some appellate courts may on occasion use loose language, it does not follow that they are unaware of the standards.

Thus, there is no dispute regarding the standard of review to be applied. All courts "recognize[ ] the deference that is due the trial court's first-hand experience of the witnesses, their demeanor, the context of the trial, and the like." *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 362 (5th Cir. 1980); *see also Rosenfield v. Wellington Leisure Prods, Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987). Nevertheless, when an abuse of discretion is shown, courts in *all* circuits – including those purporting to take a pure hands-off approach – have reversed new trial orders grounded on the weight of the evidence. *See, e.g., McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988); *Coffran v. Hitchcock Clinic, Inc.*, 683 F.2d 5 (1st Cir.), *cert. denied*, 459 U.S. 1087 (1982); *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); *Lind v. Schenley Indus., Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 385 (1960); *Abasiekong v. City of Shelby*, 744 F.2d 1055 (4th Cir. 1984); *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir. 1980); *Duncan v. Duncan*, 377 F.2d 49 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967); *Continental Air Lines, Inc. v. Wagner-Morehouse, Inc.*, 401 F.2d 23 (7th Cir. 1968); *McGee v. South Pemiscot School Dist. R-V*, 712 F.2d 339 (8th Cir. 1983); *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336

(9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985); *Moore v. Shultz*, 491 F.2d 294 (10th Cir.), *cert. denied*, 419 U.S. 930 (1974); *Watts v. Great Atl. and Pac. Tea Co.*, 842 F.2d 307 (11th Cir. 1988).

Naturally, the circuits cannot be totally uniform in their application of the abuse of discretion standard. Judgment as to what constitutes an abuse of discretion necessarily varies. These variations are inherent in the indefinable notion of "discretion." As Wright and Miller explain, "[i]t may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions [for new trial based on weight of the evidence]. Necessarily all such formulations are couched in broad and general terms that furnish no unerring litmus for a particular case." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2806, at 48-49 (1973).

In sum, there is no conflict among the circuits regarding the applicable standard of review. The Ninth Circuit's decision in this case was squarely in step with the uniformly accepted standard.[12]

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[12] Volkswagen alleges the existence of a conflict *within* the Ninth Circuit and cites that alleged conflict as a reason supporting the granting of its petition. Petn. at 25-29; *see also id.* at 15 (referring to a "hodge-podge" of standards within circuits).

First, there is no such intracircuit conflict. In response to Volkswagen's petition for rehearing with suggestion for rehearing en banc, not a single judge requested a vote to rehear the matter en banc. *Roy v. Volkswagen of Am., Inc.*, 920 F.2d at 619. The judges of the Ninth Circuit apparently felt there was no intracircuit conflict worthy of consideration.

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CONCLUSION

The United States Court of Appeals for the Ninth Circuit followed its mandate. For all the foregoing reasons, Volkswagen's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Second, even if there were a conflict within the Ninth Circuit, review here would be unwarranted. Although this Court has on occasion mentioned intracircuit conflict in granting a writ of certiorari, such a conflict is generally not a sufficient basis for granting the writ. *See* J. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. B.A. 541, 552 (1958) (quoted in R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 205 (6th ed. 1986)) ("Decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself."); *see also* Sup. Ct. R. 10 (intracircuit conflict not listed as ground for obtaining review).

APPENDIX

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUG ROY, JR., etc., et al. Plaintiffs, vs. VOLKWAGENWERK AKTIENGESELLSCHAFT, a German Corporation, and VOLKSWAGEN OF AMERICA, INC. Defendants.	CASE NO. CV 83 5254 JWC JOINT NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT DEFENDANTS VOLKSWAGEN OF AMERICA, INC. and VOLKWAGENWERK AKTIENGESELLSCHAFT, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the United States District Court, Central District of California, on January 28, 1991, reinstating the November 28, 1984 judgment entered in favor of plaintiffs' following verdict upon jury trial. That initial judgment was vacated by an Order of the United States District Court for the Central District of California, timely filed January 4, 1985 and entered January 7, 1985, granting a new trial. The United States Court of Appeals for the Ninth Circuit reversed the new trial order, and ordered the original judgment reinstated. The mandate issued on January 16, 1991 and the judgment on the original trial verdict was entered on January 28, 1991.

DATED: February 14, 1991.

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